APPEAL NO. 93256

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was convened in (city), Texas, on November 3, 1992, with (hearing officer) presiding as hearing officer. The hearing record was reopened on November 13, 1992, to allow both parties to further develop the record, and the record was closed on March 8, 1993. The issue at the contested case hearing was whether or not the claimant had disability as a result of her injury.

The hearing officer ruled that appellee (claimant herein) had disability as result of her Date of injury), injury since September 22, 1992, and that temporary income benefits (TIBS) will continue until such time claimant reaches maximum medical improvement (MMI) as that term is defined in the 1989 Act or until she no longer has disability. The appellant (carrier herein) argues that the evidence was insufficient to support the finding of the hearing officer that claimant's inability to obtain employment was due to her on the job injury and continuing medical care from her injury. The carrier also argues that if an employee who has accepted a *bona fide* offer of employment is fired for good cause, then the employee should be treated as though the employee had rejected a *bona fide* offer of employment and have TIBS suspended. Claimant argues that this is not the law and should not be the law.

DECISION

The decision of the hearing officer is affirmed.

The claimant began working for (employer) in (cit), Texas, on April 21, 1992, as a production line worker. She slipped on a piece of cardboard on the plant floor and injured her left knee on Date of injury). Claimant testified at the contested case hearing (CCH) that she reported this accident to her supervisor and was taken by her employer to Dr. P, who all parties stipulated is claimant's treating doctor. Claimant also testified that she had surgery performed on her knee on June 4, 1992, and returned to work on June 7, 1992. The parties stipulated that the treating doctor had released the claimant to "light-duty desk work, phone, and no prolonged standing or lifting." Claimant further testified that the doctor told her that with her restrictions she could only lift up to five pounds.

It was stipulated that the employer offered employment within the doctor's restrictions and that claimant accepted this employment. It was also stipulated that the offer of employment was at the claimant's pre-injury wage rate and work hours. Finally, the parties stipulated that there has been no certification of MMI.

The claimant testified that when she first returned to work that she was placed back on the line and worked on the line for four days, but, even though she was seated, her leg would hit the top of the conveyor and started bleeding. The claimant stated that she was moved from the line to the breakroom, then later to the warehouse and finally to a desk where she was wrapping paper around plastic spoons. The claimant said that she

continued to miss days because of her injured knee two or three days at a time, and she was not paid for this time.

The claimant testified that after her return to work the attitude of supervisors toward her changed. She cites as examples that rather than talking to her they would yell at her; that a supervisor ordered her to clean a tree which was kept in the office, and when she suggested putting it outside to clean it, since it was raining, the supervisor yelled at her; that when a coworker asked her to carry a box, which weighed less than five pounds, a supervisor started screaming at her; that one supervisor would curse her; and that suddenly the employer required a written doctor's excuse for absences, a policy which was selectively enforced.

The claimant's immediate supervisor and a vice-president of the employer testified in person at the contested hearing. The sworn statements of two other supervisors were admitted into evidence. The supervisors testified that they did not harass the claimant after her return to work, and to the degree she was treated differently than before her injury it was out of concern for the claimant's safety and to prevent her reinjury. The testimony of the supervisors was that whenever the claimant complained she was having problems working in an area after her injury, she was moved to another area to try to rectify the problem; that the plant was loud and sometimes one had to yell to be heard and the claimant yelled and used profanity; that the tree needed cleaning and they were trying to make light work for her; that the box claimant tried to carry weighed more than five pounds which violated claimant's work restrictions; and that the company had always had a policy of discharging an employee who had three unexcused absences, although if a good worker violated this policy, the company would counsel rather than discharge the worker. The supervisors blamed claimant's "uncooperative and belligerent" attitude for the post-injury conflict between the claimant and her supervisors and denied that the claimant was harassed because of her on-the-job injury. The supervisors also denied firing other employees after they were hurt on the job, stating other reasons for the discharge of other injured employees, claiming that a number of current employees had previously been injured on the job and were still working for employer and in the case of claimant's immediate supervisor, pointing to her own on-the-job injury.

In any case, the employer's vice-president stated that he terminated claimant's employment with the employer August 14, 1992, because of excessive unexcused absences and her uncooperative and belligerent behavior toward her supervisors. He denied her on-the-job injury had anything to do with the termination. He also denied that the claimant's filing a complaint with the Occupational Safety and Health Administration (OSHA) had anything to do with her termination, stating that he was unaware of who had filed the OSHA complaint and did not care. He stated that the termination itself was videotaped.

Claimant testified that since the discharge she has looked for other employment, applying at (employer) in (city) where she was told she could not be hired because she was under a doctor's care. Claimant testified that she has also applied for a job at the hospital and another local business. Claimant testified as to her previous job experience and why with her restrictions she was unable to currently return to any type of work she had done previously. The claimant also stated that due to lack of transportation she has been restricted to looking for a job in (city), and that there are a paucity of jobs in (city).

After the hearing and before the close of the record, but unmarked as exhibits, the hearing officer received an affidavit from claimant stating she applied for a job at (employer) on September 22, 1992, and an affidavit from an insurance investigator saying he was told that the reason (employer)s did not hire the claimant was because there had been no employment available in any capacity at the time she applied.

The carrier contends that there is "no evidence" to support the finding of the hearing officer that the claimant's failure to find employment at (employer)'s was due to the fact that she had not received an unrestricted release to return from work from her doctor because of the continuing effects of her on-the-job injury of Date of injury). The carrier contends that the only evidence which could support this is the testimony of the claimant, and the hearing officer could not rely on this testimony, contending that he had found claimant's testimony unreliable by finding that she had been discharged by the employer for good cause. Thus, the carrier contends that the only credible testimony as to the reason for claimant's failure to be hired by (employer)'s is the affidavit of the insurance investigator. The carrier also contends that the testimony of the claimant concerning the reason (employer)'s failed to hire her is vague and is the testimony of an interested party and thus is insufficient to support the finding of the hearing officer.

Article 8308-6.34 provides that the contested case hearing officer, as the finder of fact, is the sole judge of the relevance and materiality of the evidence, as well as the weight and credibility that is to be given the evidence. It is well established that the finder of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App. - Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App. - Fort Worth 1947, no writ). As the trier of fact, it was for the hearing officer to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App. - Amarillo 1974, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Under these standards of review, we find that there was evidence to support the hearing officer's finding and that the finding was supported by sufficient evidence.

The carrier also argues that since the hearing officer found that the claimant was fired

for good cause she should not be entitled to TIBS. The carrier points to Article 8308-1.03(16) which defines disability as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Carrier then argues essentially that the claimant's inability to retain employment was not because of her compensable injury, but instead due to her own misconduct which led to her discharge for good cause. Carrier contends when a claimant receives and accepts a *bona fide* offer of light duty employment, and then is fired for good cause, the claimant should be treated as though the claimant rejected the *bona fide* offer. The argument here is that the claimant's misconduct leading to a good cause discharge is essentially a rejection of the *bona fide* offer of light duty employment. The effect of the rule for which carrier argues would mean that once the claimant who has returned to work on light duty is fired by the employer for good cause, the claimant would lose forever the right to receive any further TIBS. This is not supported by the 1989 Act.

To find support in our previous decisions for its argument the carrier cites Texas Workers' Compensation Commission Appeal No. 92674, decided January 29, 1993, which carrier submits held that when claimant's inability to earn wages was due to incarceration, claimant was not entitled to TIBS for his injury. Carrier contends that using the same logic in the present case we should hold that claimant's inability to earn wages equivalent to her preinjury wages is due solely to failure to obey company policy which led to her termination. This argument misreads our rationale in Appeal No. 92674, *supra*, which is based upon the fact that the claimant could not work because he was incarcerated. As we stated in Appeal No. 92674, *supra*:

> We distinguish this case from our decision in Texas Workers' Compensation Appeal No. 92649, decided January 6, 1993, which involved continued disability of a school cafeteria worker after the end of her school year contract in that the employee in that case could have chosen to work had it not been for her compensable injury.

In the present case, the reason that the claimant cannot obtain and retain employment is not because she was terminated, but due to her injury. The hearing officer found that the claimant was unable to gain employment at (employer)'s on September 22, 1992, because of the continuing effects of injury. This brings claimant squarely within the definition of disability in the 1989 Act.

Carrier also cites Texas Workers' Compensation Commission Appeal No. 92016, decided February 28, 1992, to support its position. Its argument is that this decision contains an extensive discussion as to whether the discharge was or was not for good cause, and after a determination that the termination was for good cause, TIBS were ordered to be reinstated. Carrier contends this supports the relationship between good cause termination and entitlement to TIBS for which it argues. However, that decision

supports our holding here that whether a termination breaks the link between the injury and the inability to obtain employment is a matter for the trier of fact.

In any case, the argument fails because it is not necessary to divine by implication our holding on the issue the carrier raises because we have spoken to the issue directly. In Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991, we stated:

It is our opinion that a broadly stated rule forever denying workers' compensation benefits to an employee returned to light duty and subsequently discharged for cause, (citation omitted) has the potential to undermine a very basic purpose of workers' compensation programs: to compensate injured workers for loss of earnings attributable to a work-related injury.

Carrier, recognizing we might justifiably find our decision in Appeal No. 91027, *supra*, controlling, finally tries to distinguish the present case from that one on factual grounds, or seems to argue in the alternative that we should overrule our holding in that case for reasons of public policy. The factual distinctions between the present case and Appeal No. 91027, *supra*, argued by the carrier have no bearing on the applicability of its holding to the facts of the present case and therefore fail to distinguish the cases. We observe that our prior opinion serves, and does not undermine, the public policy at the heart of the 1989 Act.

For the foregoing reasons, we find sufficient evidence to support the decision of the hearing officer.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Susan M. Kelley
Appeals Judge